Supreme Court, U.S.
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No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DAVID J. BOATRIGHT, Petitioner,

v.

ALEXIS M. HERMAN, Secretary of the United States Department of Labor, Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A PLAINTIFF CAN AVOID THE SANCTIONS OF RULE 56(g) OF THE FEDERAL RULES OF CIVIL PROCEDURE THROUGH VOLUNTARY DISMISSAL ITSELF THAT RELIES ON NO AFFIDAVIT FROM PRIOR SUMMARY JUDGMENT PROCEEDINGS?

PARTIES

The parties to the proceeding in the Appeals Court whose judgment is sought to be reviewed are: (1) David J. Boatright, Petitioner; (2) Alexis M. Herman, Secretary, United States Department of Labor, Respondent (succeeding Robert B. Reich); and, (3) Pension Benefit Guaranty Corporation ("PBGC"), Respondent. These are the same parties in the District Court to the proceedings whose judgment is sought to be reviewed (Appendix A).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David J. Boatright, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit and of the United States District Court for the Northern District of Texas, Dallas Division.

OPINIONS BELOW

Opinions Below are reproduced in this Petition (Appendix A and B, *Infra*, p. 29-59). Petitioner was not able to establish if any opinion were published. The Opinion of the Appeals Court was entered on June 12, 1997; the final judgment of the District Court was entered on October 9, 1996.

JURISDICTION

The jurisdiction of this Court is under 28 U.S.C. § 1254(1). The Court of Appeals for the Fifth circuit entered judgment on June 12, 1997. The District Court for the Northern District of Texas, Dallas Division, entered final judgment on October 9, 1996.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, REGULATIONS, AND REFERENCE

The applicable Constitutional provisions, statutes, rules, regulations, and reference involved are set forth in Appendix C. (*Infra*, p. 60-94). These are:

Constitution of the United States:

Article III, Section 2

Fifth Amendment

Fourteenth Amendment, Section 1.

Acts of Congress:

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Sections 103(a)(1), 103(a)(2), 103(d), 103(e)

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29 CFR § 2550.408c-2, 29 CFR § 2606.22,

and 29 CFR § 2618.

Other Authorities:

Textbook Reference—

Jeffrey D. Mamorsky, ed., *Employee Benefits Handbook*; Warren, Gorham & Lamont; § 21.24.

STATEMENT

The Order and Judgment of the United States Court of Appeals for the Fifth circuit was entered on June 12, 1997. This Petition is filed within ninety (90) days of the Order of the Appeals Court that had jurisdiction pursuant to 28 U.S.C. § 1291. The

initial appeal was perfected in accordance with Rule 4(a), F.R.A.P. The Judgment of the District court, entered on October 9, 1996, was a final judgment.

The Question Presented in this Petition is of the utmost importance. The Appeals Court ruled that the District Court, despite denial sua sponte, had jurisdiction of Petitioner's action for sanctions against Respondents pursuant to Rule 56(g) of the Federal Rules of Civil Procedure. Yet the Appeals Court affirmed. But its Ruling curtails the powers of the court, decides new Federal law, and conflicts with the Supreme Court in granting voluntary dismissal a privileged position that avoids the sanctions of Rule 56(g). Currently, there is no Supreme Court ruling on a question of Rule 56(g).

Respondents commenced their lawsuit in the District Court in 1988, and conducted it over four years exclusively through Rule 56 motions for summary judgment.[1] This lawsuit arose out of the sale of potash mines in the State of New

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[1] The parties in original proceedings in the District Court were: (1) Robert B. Reich, Secretary, U.S. Dept. of Labor, Plaintiff; (2) Pension Benefit Guaranty Corporation ("PBGC"), Plaintiff-Counter Defendant; (3) Thomas Lundberg, Defendant; (4) Samuel Longo, Joe F. Wall, John Sanders, Clarence D. Donaldson, 127 Inc., Capital General Corp., Defendants; (5) David J. Boatright, Defendant-Counter Claimant.

Mexico by Ideal Basic to Thomas D. Lundberg ("Lundberg") on December 31, 1985. The sale transaction depended on the concurrent termination of three pension plans associated with the mines for Lundberg's retirement plan, generally known as 401(k).

Ideal Basic represented pension plan assets of $20 million and surplus of $1 million. After the sale closing, Lundberg contacted Petitioner and his company, Boatright & Associates, Inc. ("Boatright"), took on the actuarial assignment to terminate the retirement plans. However, he discovered that the pension plans did not have the assets nor the surplus that Ideal Basic had represented in the sale transaction. Instead, he found assets of $11 million and a funding deficiency of $1.1 million of unfunded liabilities.

In April 1986, seeking a remedy and restitution, Petitioner sent his Report to Ideal Basic. His Report showed that Ideal Basic had counted $7.3 million in pension assets that belonged to Aetna Insurance Company ("Aetna") for its "irrevocable commitments."

ERISA forbade counting this money in pension asset, and, therefore, Petitioner subtracted it from the figures that Ideal Basic represented. (29 CFR § 2618.2, 2618.3(a), Ap-

pendix C, *Infra*, p. 79-80, 83.) Aetna's money that Ideal Basic counted in pension plan assets had created fictional surplus, because a funding deficiency of $1.1 million resulted when Petitioner subtracted it.

Ideal Basic benefited in this scheme for artificial surplus. It reduced or eliminated their annual pension contributions. For the "full-funding limitation" of ERISA made the minimum pension contribution for a given year not more than the amount to fully fund the plan.[2] (ERISA § 302 c(6)-(7), Appendix C, *Infra*, p. 72-73.)

Petitioner also discovered in his review that even before the sale transaction Aetna already had withdrawn its money. This made the pension plan representations of Ideal Basic worthless.

In August 1987, Lundberg notified Respondents that Aetna withdrew $9.2 million before the sale transaction. He said that he anticipated a settlement from his lawsuit against Aetna to recover more than $2 million from their use of excessive and obsolete premium rates, determined at the time with an abnormally low interest rate assumption, for the

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[2] Textbook Reference: Jeffrey D. Mamorsky, ed., *Employee Benefits Handbook*, Warren, Gorham & Lamont, 1982, 1987—§ 21.24. Appendix C, p. 94.

"irrevocable commitments." He said that Aetna had agreed to correct erroneous participant records, which caused some of their excessive withdrawal. He also informed Respondents that these matters had delayed and interrupted completion of the plan termination process. He submitted a declaration under penalty to complete it as settlement with Aetna developed.

On October 5, 1988, Respondents filed separate original Complaints, charging defendants with violations of ERISA, including improper plan termination and reversion and misuse of funds. They consolidated their lawsuits on April 21, 1989. Respondents charged Petitioner with four counts. Petitioner responded with his answer and counterclaim. His answer denied the charges. His counterclaim accused Respondents with: negligence, injurious falsehoods, false pretenses, and obstruction of recovery of assets from Aetna. His counterclaim was dismissed summarily, because of sovereign immunity of Respondents against a claim of libel or slander; and because, the Court said, he lacked ERISA fiduciary status required to sue Respondents for negligence. (Appendix B, *Infra,* p. 46-48, 55-58)

Respondents conducted their lawsuit in a series of Rule 56 motions for summary judgment in which they represented

pension plan assets and surplus, first in 1989, with only the testimony of David Nelson ("Nelson"), an employee-attorney of Ideal Basic, who represented it in the sale transaction, then in 1990 until 1993, with only the affidavits of Janice Burton ("Burton"), an employee of Respondents for pension plan termination, who, from doubtful personal knowledge, certified representations contrary to Nelson's testimony. Nelson's testimony was in 1987 before a State of New Mexico grand jury. Respondents initially used his testimony exclusively for the amount of pension plan assets, and later used Burton's affidavit for the amount of pension plan surplus.

Respondents always represented to the District Court that no genuine material facts were in dispute, and always presented a statement of material facts not in dispute. But these representations were knowingly false and in bad faith.

In April 1992 Respondents obtained a summary judgment against Petitioner. (Appendix B, *Infra*, p. 53-54) Petitioner filed a motion to set aside judgment because of Respondents' misconduct in coming by judgment (Appendix B, *Infra*, p. 47-49). Using Burton's declaration that Lundberg received all assets and misquoting ERISA, they had misrepresented in bad faith that ERISA prohibited John Sanders

("Sanders"), a fiduciary and a defendant, from plan payment of his legal fees for his work to recover pension assets from Aetna (*Id*, p. 53-54). Respondents characterized this payment as embezzlement.

First, the critical point is Respondents' unlawful counting of Aetna's money in pension plan assets. Boatright's Report opposed this. It said, "[Aetna's Money] should not be considered in either Plan Assets or Plan Liabilities. . . . The Aetna Contract . . . represent[ed] irrevocable commitments." Aetna's assets backed its own obligations. So neither its assets nor its liabilities could be counted in the pension plan. (29 CFR § 2618.2 and § 2618.3(a), Appendix C, *Infra*, p. 79-80, 83.) Besides, Respondents never put in the Record the mandated Federal annual reports, filed with them by Ideal Basic, that reported under penalty pension plan assets and liabilities, and that enabled a verification of pension plan assets and surplus (ERISA § 103(a) (1)-(2), 103(d)(6), 103(e), Appendix C, *Infra*, p. 65-71).

Respondents, in spite of this, used only Nelson's testimony for the amount of pension plan assets, when Nelson testified that he was unsure. Nelson acknowledged that no transfer of Aetna's money occurred. He said, he had found

out about Aetna's contractual rights to this money after the sales transaction. He said, it was "seven-plus million," but he was "unsure," that ". . .we're not really sure how much they retained." Nevertheless, Respondents with only his testimony represented: that pension plan assets were $18 million, that $11 million was transferred to Lundberg, and that Aetna "retained" $7 million.

Respondents, however, knew all the time from Lundberg's earlier notice to them, four months before Nelson's testimony, that Aetna, before the sale transaction, had withdrawn $9.2 million. But, later, with Burton's affidavit and declaration, they would represent contrarily that Ideal Basic transferred all assets to Lundberg. Also, later, Burton would merely list Lundberg's notice as an exhibit in her affidavit and subsequent declaration.

After Nelson, Respondents used Burton to fabricate her affidavit. In its memorandum in support of summary judgment in April 1990, Respondent's Deputy General Counsel, Jeffrey Cohen ("Cohen"), acknowledged Boatright's findings of a pension plan funding deficiency instead of surplus in the sale transaction. But Cohen immediately discarded this Report with only a mere statement, to the effect that Peti-

tioner worked on behalf of Lundberg. He then used Burton's affidavit and certified that Ideal Basic transferred to Lundberg all assets and surplus of $1 million.

Until 1990 Respondents had used an inconspicuous ruse as cover-up. Except for the later contrary certifications of Burton and Cohen, they represented $7 million that Aetna "retained" in pension plan assets, when Aetna withdrew $9.2 million: an excess of $2.2 million. ERISA prohibited any distribution or transfer to an insurance company in anticipation of plan termination. (29 CFR § 2618.4(b), Appendix C, *Infra*, p. 84.) But Respondents used the word "retained," to misrepresent that Aetna "retained" pension plan assets. This way, they not only concealed Ideal Basic's illegal scheme of counting Aetna's money that generated artificial surplus then reduced or eliminated their pension contributions, but also covered up the later illegal distribution Aetna took before the sale.

Then in the next step, for Burton and Cohen the Aetna retention never happened, because they represented that Lundberg received all the assets and surplus in the sale transaction, in spite of Lundberg's notice to the contrary as seen in Burton's affidavit and declaration, and in spite of Nelson's testimony that Aetna "retained seven-plus million," but that ". . .

we're not really sure how much they retained" as seen in Respondents' earlier motion exhibit.

To recover assets from Aetna, ERISA explicitly allowed Sanders, a trustee-attorney-fiduciary, payment of reasonable expenses and compensation—not prohibited any compensation to him because he was a fiduciary, which is what Respondents misrepresented. (29 CFR § 2550.408c-2(a), Appendix C, *Infra,* p. 74-76.)

The Record in the District court shows that the Plan document and Trustee minutes approved compensation to Sanders. This was a plan expense to recover over $2 million of plan assets from Aetna, not an employer's expense (Lundberg Co.) unless the employer elected voluntarily. *Id.* Before the falsifications of Cohen and Burton, Aetna money counted for more than 50% of Respondents' represented pension plan assets. Furthermore, violating Constitutional due process, Respondents never issued a determination notice that compensation to Sanders was unreasonable, rather claimed embezzlement (29 CFR § 2606.22, Appendix C, *Infra,* p. 77). Indeed, violating their duties for disclosure, they never put the Aetna contract nor the ERISA annual reports in the Record. (139 FRD 478; ERISA § 103(a) (1)-(2), 103(d)(6), 103(e),

Appendix C, *Infra*, p. 65-71.) (Opinions, Appendix B, *Infra*, p. 46, 48, 55, 56.)

After Petitioner's motion to set aside judgment, Respondents made a combined response and motion. Still misrepresenting ERISA and the facts in the Record, in the response-motion, they asked for final judgment against Petitioner on the Sanders' fiduciary misconduct charge, and asked for dismissal with prejudice of three other remaining charges against him. In February 1993, the District Court granted Respondents' motion unchanged. (Appendix B, *Infra*, p. 50.)

Petitioner appealed. Meanwhile, Jeffrey Cohen declared under penalty of perjury that he "never falsified any documents concerning Mr. Boatright." Respondents told the Appeals Court that it must remand to see if Petitioner himself were a fiduciary in light of the recent Supreme Court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). In February 1994 the Appeals Court remanded for this determination (Appendix B, *Infra*, p. 49). Petitioner was denied a rehearing, and his writ of certiorari to the Supreme Court was out of time (Appendix B, *Infra*, p. 44, 59).

Now on remand in the District Court, Respondents moved for voluntary dismissal, for they already had told that

Court before appeal that, "He has not alleged--nor can he--that he is a fiduciary. . . . And contrary to Boatright's reading of PBGC's First Amended Complaint, PBGC has not alleged that Boatright is a fiduciary." (Appendix B, *Infra,* p. 42-43.) In April 1995, the District Court granted Respondents' motion for voluntary dismissal that was affirmed upon appeal in March 1996 (Appendix B, *Infra,* p. 37).

A. Proceedings Below.

In September 1996 Petitioner filed his Rule 56 (g) motion for sanctions against Respondents, and the District Court immediately denied it on its own initiative for lack of jurisdiction. (Appendix A, *Infra,* p. 32-33.) Petitioner appealed. Respondents made no defense of misconduct. They acknowledged that the District Court had jurisdiction, but argued that Petitioner had filed an abusive motion as the ground for the District Court's dismissal for lack of jurisdiction. In June 1997, the Appeals Court ruled that the District Court had jurisdiction. It rejected the argument of Respondents that Petitioner filed an abusive motion. Yet even so, it affirmed, ruling that a ground existed that prohibited reversal, "that no affidavit in support of summary judgment was relied upon in the voluntary dismissal of this action." (Appendix A, *Infra,* p. 31.)

REASONS FOR GRANTING THE PETITION

Petitioner presents three reasons for granting this Petition: (1) The lower Courts erroneously deny Constitutional rights to due process and to equal protection of law, because the mandates of Rule 56(g) to sanction misconduct are set aside; (2) The Appeals Court grants voluntary dismissal a special privilege that conflicts with the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); and, (3) The Appeals Court decides an important question of Federal law in invoking the Supreme Court in *Riley v. Commissioner*, 311 U.S. 55, 59 (1940), that curtails the powers of the court and that precludes sanctions under Rule 56(g).

1. The lower Courts erroneously deny Constitutional rights to due process and to equal protection of law, because the mandates of Rule 56(g) to sanction misconduct are set aside.

The mandates of due process require the District Court to conform to Rule 56(g). On review the Appeals Court ruled that, "The District court did not lack jurisdiction over the collateral motion for sanctions." Thus, Constitutional due process and equal protection of the law are denied.

It does not matter that voluntary dismissal, though after final judgment, relies on none of the affidavits from prior Rule

56 motions for summary judgment. For "A court . . . must comply with the mandates of due process . . . in determining that the requisite bad faith exists." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 50 (1990); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). Rule 56(g) states:

> Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Importantly, "the words of the Rules must be given their plain meaning." *Pavelic & Leflore v. Marvel Entertainment Group*, 110 S. Ct. 456, 458 (1989).

Rule 56(g) governs Petitioner's action for sanctions. The *Chambers* Court stated "that the inherent power 'is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function.'" *Chambers*, at 42, quoting *Nasco. Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990). However, "To the extent conduct violates an explicit statute or rule, there is no necessity for resorting to

power inherent in the judicial assignment." *Nasco. Inc.*, at 702.

Rule 56(g) addresses directly the problem of bad faith affidavits in Rule 56 motions and reaches the offending party as well as its attorneys. "[B]ecause individual rules address specific problems, in many instances it might be improper to invoke one when another directly applies." *Chambers*, at 50, n. 12, 42-43, n.8. *Thomas v. Capital Soc. Services, Inc.*, 836 F.2d 866 (5th Cir. 1988).

The goals of Rule 56(g) must be like those of Rule 11. For Rule 11, the Appeals Court said these are: deterrence, punishment, and compensation. *Willy v. Coastal Corp.*, 915 F.2d 965, 968 (5th Cir. 1990).

In 1991, the Federal Judicial Center published the Document: *The Analysis and Decision of Summary Judgment Motions*, William W. Schwarzer, Allan Hirsch, and David J. Barrans, 139 F.R.D. 441. At 139 F.R.D. 478, the Document states:

> [T]he movant owes a duty of candor to the court; it may not present only the portions of the record supporting its position while knowingly omitting evidence to the contrary that may raise a genuine issue of material fact. Such conduct arguably warrants the imposition of sanctions under Fed.R.Civ. 11 or Rule 56(g).

At 139 F.R.D. 501:

> Rule 56(g) directs the court to impose sanctions for improper affidavits. . . . Rule 56(g) provides for sanctions against parties [and attorneys] employing affidavits 'presented in bad faith or solely for the purpose of delay.'

The Document cites two cases where the court imposed sanctions (139 F.R.D. 501, n. 326):

1. *Acrotude v. J.K. Fin. Group*, 653 F.Supp. 470, 478 (N.D.Ga. 1987)

   "Affidavit 'flatly at odds with facts indisputably within [affiant's] knowledge.'"

2. *Dardanell v. U.S.*, 634 F.Supp. 186, 190 (D.Minn. 1986), *aff'd*, 822 F.2d 1094 (8th Cir. 1987)

   "Affidavit conflicts with information contained in accompanying brokerage statement."

Rule 56(g) mandates the District Court to impose sanctions for improper affidavits presented in bad faith or solely for delay.

2. The Appeals Court grants voluntary dismissal a special privilege that conflicts with the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

The Motion for sanctions is for a collateral action, and the Appeals Court acknowledges this in its Ruling.[3] But the Court grants improperly a special privilege to voluntary dismissal that conflicts with the Supreme Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

The Appeals Court sees the proceedings in the District Court as: (1) Rule 56 summary judgment with affidavits and (2) voluntary dismissal without affidavits. Because of only the latter, it stops fully the sanctions of Rule 56(g).

Voluntary dismissal, however, can not stop the operation of sanctions of Rule 56(g) to any or all of the summary judgment proceedings that used false affidavits in bad faith. "Petitioner's voluntary dismissal did not divest the District Court of jurisdiction to consider respondents' Rule 11 motion." *Cooter & Gell*, at 398.

"The fact that the Plaintiff has voluntarily dismissed his suit does not mean that the Court should not impose sanctions or has no jurisdiction to impose sanctions . . . It is no defense

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[3] The Supreme Court Decisions are: *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44, 56 (1990). *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-396 (1990). *United States v. Mine Workers*, 330 U.S. 258, 294 (1947) *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, n. 13 (1982).

that defendants waited until the end of the case to move for sanctions." *Smith v. Our Lady of the Lake Hosp. Inc.*, 135 FRD 139, 146 (M.D.La. 1991).

The design of Rule 41 for voluntary dismissal intended to curb abuses. *Cooter & Gell*, at 397. "Dismissal without prejudice is a dismissal that does not 'operat[e] as an adjudication upon the merits,' and thus does not have a res judicata effect." *Cooter & Gell*, at 396. "In our view, nothing in the language of Rule 41(a)(1)(i), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose sanctions after such a dismissal." *Cooter & Gell*, at 395.

"[A] litigant who violates Rule 11 merits sanctions even after a dismissal." *Cooter & Gell*, at 398. The Authors of, *The Analysis and Decision of Summary Judgment Motions, Supra* at 478, hold the same opinion for one who violates the conditions of Rule 56(g).

3. The Appeals Court decides an important question of Federal law in invoking the Supreme Court in *Riley v. Commissioner*, 311 U.S. 55, 59 (1940), that curtails the powers of the court and that precludes sanctions under Rule 56(g).

The Appeals Court cites *Bickford v. International Speedway Corp.*, 654 F.2d 1028, 1031 (5th Cir. 1981), as

authority prohibiting reversal of a lower court if there exists at all a ground for the correctness of its decision even if it gave the wrong ground. The Appeals Court ruled (Appendix A, *Infra*:, p. 31):

> The district court did not lack jurisdiction over the collateral motion for sanctions See *Miranti v. Lee* 3 F3.d 925, 927 (5th Cir. 1993). Nevertheless, reversal is not required because Boatright is not entitled to relief under Rule 56(g), in that no affidavit in support of summary judgment was relied upon in the voluntary dismissal of this action. See *Bickford v. International Speedway Corp.*, 654 F.2d 1028, 1031 (5th Cir. 1981).

The ground of this Ruling is "no affidavit in support of summary judgment was relied upon in the voluntary dismissal of this action." But this is not found in *Bickford*. What is in *Bickford* is if and only if a ground indeed exists, then reversal is inappropriate. *Bickford* says:

> But reversal is inappropriate if the ruling of the district court can be affirmed on any grounds, regardless of whether those grounds were used by the district court. E.g., *Riley v. Commissioner*, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940).

There is nothing beyond this in *Riley*, cited in *Bickford*. Thus, the Ruling of the Appeals Court first promulgates a ground, then it uses that ground to invoke the authority of *Riley* in *Bickford*. Yet, authority does not support that ground itself.

Furthermore, if a ground or voluntary dismissal is as papers filed with the court, then it must be legally tenable and not interposed for any improper purpose. *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2454 (1990). *Business Guides v. Chromatic Comm.*, 489 U.S. 533 (1990).

"Of particular reference . . . a federal court [can] vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Chambers*, at 44.

But here, the Appeals Court decides an important question of Federal law, that conflicts with the Supreme Court in *Cooter & Gell*, and that avoids sanctions under Rule 56(g). For a plaintiff only needs the ground of voluntary dismissal that relies on no affidavit from summary judgment. Indeed, if this ground prohibits reversal of a lower court, that dismisses a motion for sanctions, then without contradiction, it likewise prohibits a court from imposing sanctions, or causes reversal of one that does.

Petitioner urges the Supreme Court, however, to determine if misconduct has protection from the sanctions of Rule 56(g). For nothing stops a plaintiff from filing a knowingly false affidavit on a genuine issue of material fact in bad faith in a Rule 56 motion for summary judgment and, if trou-

ble is imminent even after final judgment, from seeking and then receiving the protection and safe haven of voluntary dismissal. However, voluntary dismissal with this special privilege critically curtails the powers of the court to make it function. Just as important, this special privilege arbitrarily denies Constitutional rights to due process and to equal protection of law. (Appendix C, *Infra,* p. 62-64.)

CONCLUSION

Petitioner urges that this case satisfies the standards of Rule 10 of this Court's Rules for granting certiorari. For the foregoing reasons, and that an opinion on Rule 56(g) will bring certainty and uniformity to this area, this Petition for a writ of certiorari should be granted, and the case set for briefing.

RESPECTFULLY SUBMITTED.

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APPENDIX A
DECISIONS FOR REVIEW
RULE 56(g) PROCEEDINGS

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Ex. 1 June 12, 1997

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-11305

Summary Calendar

ROBERT B. REICH, Secretary,

U. S. Dept. of Labor,

Plaintiff-Appellee,

and

PENSION BENEFIT GUARANTY CORPORATION,

Plaintiff-Counter Defendant-Appellee,

versus

THOMAS LUNDBERG,

Defendant-Counter Defendant,

SAMUEL LONGO; JOE F. WALL; JOHN SANDERS;
127 INC.; CAPITAL GENERAL CORP.,

Defendants,

and

DAVID J. BOATRIGHT,
Defendant-Counter Claimant-Appellant,

and

THOMAS LUNDBERG,

Defendant.

Appeal from the United States District Court
for the Northern District of Texas
(3:88-CV-2470-X)

Before SMITH, DUHE, and BARKSDALE, Circuit Judges. PER CURIAM:*

Subsequent to the second appeal of this action being final, David J. Boatright moved for sanctions pursuant to FED. R. CIV. P. 56(g) (allowing sanctions against party presenting affidavits in support of summary judgment in bad faith or solely for purpose of delay). The district court ruled that it lacked jurisdiction.

The district court did not lack jurisdiction ever the collateral motion for sanctions. *See Miranti v. Lee,* 3 F.3d 925, 927 (5th Cir. 1993). Nevertheless, reversal is not required because Boatright is not entitled to relief under Rule 56(g),in that no affidavit in support of summary judgment was relied upon in the voluntary dismissal of this action. *See Bickford v. International Speedway Corp.,* 654 F.2d 1028, 1031 (5th Cir. 1981) (reversal inappropriate if district court ruling of can be affirmed on any grounds, regardless of whether those grounds were relied on by district court).

Boatright's motions to void removal of a party and to file a corrected brief are DENIED as moot.

AFFIRMED; MOTIONS DENIED

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Ex. 2 Oct. 9,1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT REICH, Secretary of the
U.S. Department of Labor,

Plaintiff,

vs. Case No. 3:88-CV-2470-X

THOMAS D. LUNDBERG, et al,

Defendants.

ORDER

Before the Court is Defendant Boatright's Motion to Reconsider, filed October 7, 1996.

The motion is DENIED.

SO ORDERED this 9th day of October, 1996.

Joe Kendall

U.S. District Judge

Ex. 3 Sep 30, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT REICH, Secretary of the

U.S. Department of Labor,

Plaintiff,

vs. Case No. 3:88-CV-2470-X

THOMAS D. LUNDBERG, et al,

Defendants.

ORDER

Before the Court is Defendant Boatright's Motion for Contempt Against Plaintiffs, filed September 26, 1996. This case was dismissed in February 1995. The dismissal was affirmed by the Fifth Circuit in March 1996. The Court has no further jurisdiction over this matter. The Clerk is directed to UNFILE Defendant Boatright's motion.

SO ORDERED this *30* day of September, 1996.

Joe Kendall
U.S. District Judge

Ex. 4 Nov. 7, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT REICH, Secretary of the

U.S. Department of Labor,

Plaintiff,

vs. Case No. 3:88-CV-2470-X

THOMAS D. LUNDBERG, et al,

Defendants.

ORDER RETAINING THE RECORD

Pursuant to Rule 11 {e), Federal Rules of Appellate Procedure, the Clerk of this Court shall retain the record in this case, subject to the request of the Court of Appeals; and transmit a copy of this Order, a copy of the docket entries, and copies of such parts of the record as the parties may designate to the Clerk of the United States Court of Appeals for the Fifth Circuit.

SO ORDERED.

Signed November 7 , 1 996.

JOE KENDALL
UNITED STATES DISTRICT JUDGE

APPENDIX B
REMANDED AND ORIGINAL PROCEEDINGS

Ex. No.	Order	Court	Date	Page
5	Appeal: Affirmed Voluntary Dismissal	5th Cir. CA	3-15-96	36
6	On Remand Final Judgment: Voluntary Dismissal Granted	N.Dist.TX. Dallas	4-17-95	42
7	On Remand Judgment: Voluntary Dismissal Granted	N.Dist.TX. Dallas	2-28-95	43
8	Writ out of time	Supreme Court	10-3-94	44
9	Appeal: Remanded in part/ Affirmed in part	5th Cir. CA	2-22-94	45
10	Final Judgment	N.Dist.TX. Dallas	2-3-93	50
11	Rule 56 Summary Judgment	N.Dist.TX. Dallas	4-6-92	53
12	Petitioner's Counter-claim Dismissed	N.Dist.TX. Dallas	10-29-91	55
13	Rehearing Denied	5th Cir. CA	3-24-94	59

IN THE UNITED STATES COURT OF

APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10504

(Summary Calendar)

ROBERT B. REICH, Secretary of the

United States Department of Labor, Plaintiff.

and

PENSION BENEFIT GUARANTEE CORPORATION,
Plaintiff-Counter Defendant-Appellee,

VERSUS

THOMAS D. LUNDBERG,

and

SAMUEL LONGO; JOE F. WALL;
JOHN SANDERS; 127 INC;
CAPITAL GENERAL CORPORATION

Defendants,

and

DAVID J. BOATRIGHT

Defendant-Counter Claimant Appellant.

Appeals from United States District Court
for the Northern District of Texas
(3:88CV02470 and 3:88CV02471)

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:*

David J. Boatright appeals the district court's granting of Pension Benefit Guarantee Corporation's (PBGC's) motion for voluntary dismissal of the suit against him, contending that the dismissal should have been granted with prejudice, instead of without prejudice. Finding that the district court did not abuse its discretion in granting the voluntary dismissal without prejudice, that dismissal is AFFIRMED, and Boatright's requests for relief are DENIED.

BACKGROUND

Boatright was an actuarial consultant hired by Lundberg in 1986 to report on the assets of a new pension plan that Lundberg was purchasing for his company. As a consequence of his actions on that consulting job, Boatright was added as defendant to PBGC's embezzlement suit against Lundberg in 1991. This court in part affirmed the grant of summary judgment against Boatright, and the dismissal of his counterclaims for slander and defamation, but remanded for a determination of the damage award against Boatright.

Following remand from this court, PBGC filed a motion for voluntary dismissal of the action, pursuant to Fed. R Civ. P. 41(a)(2), stating, inter alia, that the intervening case

law could conflict with the damage award against Boatright and that, in any event, Boatright had represented that he had virtually no assets. Boatright did not oppose the motion for voluntary dismissal, but requested that the court dismiss the case "with extreme prejudice of a vexatious, malicious, and vindictive nature." He also stated that the lawsuit violated a "written proffer agreement" with the United States Attorney that no information proffered in the criminal action against Boatright would be used against him in any matter.

The district court granted PBGC's motion for voluntary dismissal, but did not state whether the dismissal was with, or without prejudice. Boatright filed a motion to amend the order to reflect a dismissal with prejudice. The district court denied the motion, finding no compelling reason for the requested amendment and stating that PBGC's motion for dismissal clearly demonstrated that PBGC had no further desire to prosecute the case. Boatright filed a timely notice of appeal.

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

DISCUSSION

Boatright contends that the district court erred in denying his motion to change the order of dismissal to reflect a dismissal with prejudice, asserting that the lawsuit against him was highly prejudicial and damaging and was based on information protected by an agreement between him and the United States Attorney.

Boatright apparently views a dismissal with prejudice as akin to a sanction for bringing a frivolous claim, or for bringing a claim meant primarily to harass. *See* Fed. R. Civ. P. 11. It is not. A dismissal with prejudice merely means that the lawsuit is ended. *Schwarz v. Follodor,* 767 F.2d 125, 129 (5th Cir., 1985). As such it has the effect of a final adjudication on the merits, and further pursuit of the action is barred. *See id.*

In the case *sub judice,* the district court granted the plaintiff's motion for voluntary dismissal. A plaintiff may move the district court to dismiss his civil action voluntarily, and unless otherwise specified in the order, a voluntary dismissal is without prejudice. Fed. R. Civ. P. 41 (a)(2). A voluntary dismissal will be granted unless the defendant would suffer legal prejudice other than the prospect of a second law-

suit; thus, potentially, a plaintiff who has voluntarily dismissed his cause of action may be able to reassert it. *Manshack v. Southwestern Elec. Power Co.*, 915 F.2d 172, 174 (5th Cir. 1990). Thus, the only difference between a dismissal with prejudice and one without, is that in a dismissal without prejudice, the plaintiff may be able to bring the suit again at a later date, depending upon the circumstances of the case.

In this instance, however, even were PBGC to reassert its action against Boatright, the suit would be barred by the applicable ERISA statute of limitations. *See Maher v. Strachan Shipping Co.*, 68 F.3d 95, 954 (5th Cir. 1995). Because no difference exists between a dismissal without prejudice and one with prejudice with regard to Boatright, the issue is moot.

To the extent that Boatright attempts again to argue the merits of his counterclaim against PBGC, that issue has been decided and reconsideration of it is barred by the principles of *res judicata*. *See Travelers Ins. Co. v. St Jude Hosp. of Kenner, La., Inc.*, 37 F.3d 193, 195 (5Th Cir. 1994), *cert. denied*, 115 S. Ct. 1696 (1995). Additionally, Boatright asks, for the first time on appeal, that the court void his actuary termination by the Joint Board for the Enrollment of Actuaries and open a counterclaim against Jeffrey Cohen. Because

Boatright raises these claims for the first time on appeal, they are not reviewable by this court. *See Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Accordingly, the district court's dismissal without prejudice is AFFIRMED, and Boatright's requests for relief are DENIED.

Ex. 6 April 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT REICH, Secretary of the
U.S. Department of Labor,

Plaintiff.

vs.

Case No. 3:88-CV-2470-X

THOMAS D. LUNDBERG, et al,

Defendants.

ORDER

Before the Court is Defendant Boatright's Motion to Amend Order of Dismissal filed February 28, 1995. The Court granted the Plaintiff's motion for a voluntary dismissal. Boatright asks the Court to amend the Order dismissing this case to reflect that the dismissal is with prejudice. The Plaintiff's motion clearly stated that Plaintiff had no further desire to prosecute the case. Finding no compelling reason to amend the Order of dismissal, the Defendant's Motion is DENIED.

SO ORDERED this 17th day of April, 1995.

Joe Kendall
U.S. District Judge

Ex. 7 Feb. 28, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT REICH, Secretary of the
U.S. Department of Labor,

Plaintiff.

vs.

Case No. 3:88-CV-2470-X

THOMAS D. LUNDBERG, et al,

Defendants.

ORDER OF DISMISSAL

This Court previously rendered final judgment against various defendants, including David J. Boatright ("Boatright ") . Boatright appealed, and the United States Court of Appeals for the Fifth Circuit remanded this case to this Court for further proceedings.

Plaintiff Pension Benefit Guaranty Corporation ("PBGC") has filed a motion for voluntary dismissal pursuant to Fed. R. Civ. p. 41(a)(2).

PBGC's motion is GRANTED.

This Order terminates this litigation in its entirety, and has no effect on any defendant other than David J. Boatright.

Date: February 28, 1995

Joe Kendall
UNITED STATES DISTRICT JUDGE

Ex. 8 October 3, 1994

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

October 3, 1994

David J. Boatright
350 Wallace Road
Nashville, TN 37211

Re: David J. Boatright v. Robert B. Reich,
Secretary of Labor, et al.
No. _____

Dear Mr. Boatright

The Court today entered the following order in the above entitled case:

"The motion to direct the Clerk to file a petition for a writ of certiorari out-of-time is denied."

Very truly yours,

WILLIAM K. SUTER, Clerk

By
Francis J. Lorson
Chief Deputy Clerk

cc: Solicitor General
Clerk, U.S. Court of Appeals for the
Fifth Circuit (Your No. 93-1157)

Ex. 9 Feb. 22 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 93-1157

Summary Calendar

ROBERT B. REICH, Secretary of the United States Department of Labor, et al.,

Plaintiffs,

versus

PENSION BENEFIT GUARANTY CORPORATION, on its own behalf and as a statutory trustee of RETIREMENT PLAN FOR SALARIED EMPLOYEES OF LUNDBERG INDUSTRIES, LTD., etc.,

Plaintiff-Counter Defendant-Appellee,

versus

THOMAS D. LUNDBERG, ET AL., Defendants,

DAVID J. BOATRIGHT,

Defendant-Counter Plaintiff-Appellant.

Appeal from the United States District Court for the Northern District of Texas (3:88- CV-2470-X c/w 3:88-CV-2471-X)

Before KING, HIGGINBOTHAM, and BARRSDALE, Circuit Judges.

PER CURIAM:*

•Local Rule 47.5 provides: The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

The Secretary of Labor and the Pension Benefit Guaranty Corporation (PBGC), a federal entity that administers the pension plan termination insurance program established by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §5 1301-1461, sued to recover money allegedly illegally removed from three pension plans. The lawsuits maintained that two trustees had breached their fiduciary duties under ERISA, 29 U.S.C. §§ 1104-06, by diverting plan assets to personal accounts, and that several parties, including David Boatright, the plans' actuary, actively and knowingly participated in the transfer.

Boatright denied the allegations and counterclaimed alleging that PBGC knowingly and willfully made false statements causing him irreparable harm and financial loss. PBGC moved to dismiss the counterclaim for lack of subject matter jurisdiction and failure to state a claim. The district court dismissed the counterclaim, stating that Boatright had alleged libel and slander, claims not excepted under the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, et seq.

The court then granted PBGC's motion for summary judgment holding Boatright and a trustee jointly and severally

liable. Several months later, Boatright filed something akin to a 60(b) motion, requesting that the court reconsider its rulings. PBGC moved the court to enter final judgment against Boatright, pursuant to Fed. R. Civ. P. 54(b). The court did so, reiterating its dismissal of the counterclaim and reaffirming its summary judgment award. Boatright appealed. We affirm in part and remand in part.

II.

Boatright contends that the district court erred in dismissing his counterclaim because he alleged not libel and slander but injurious falsehood. Our review of this issue is de novo, see Hobbs v. Hawkins, 968 F.2d 471, 475 (5Th Cir. 1992). To state a claim for injurious falsehood, Boatright had to allege pecuniary harm resulting from the unprivileged publication of false statements, with knowledge or reckless disregard of the falsity concerning his property or product. See Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1155 n.6 (D.C. Cir. 1985).

Boatright maintains that the false statements by PBGC cost him the livelihood and profit of his occupation as "Enrolled Actuary." The statements regarded his performance as actuary. Boatright does not have a protectible property in-

terest in his employment. See American Fed'n of Gov't Employees v. Stetson, 640 F.2d 642, 645 (5th Cir. 1981).

Boatright argues, for the first time on appeal, that his counterclaim was malicious prosecution and abuse of process by a federal investigative officer. See 28 U.S.C. § 2680. We will not consider issues raised for the first time on appeal unless they are purely legal in nature and refusal to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Boatright has not presented any facts, either to the district court or on appeal, as to the official status of the culpable person. As this claim involves a factual determination, we will not address it.

III.

Boatright alleges that the district court erred in denying his Rule 60(b) motion to set aside the summary Judgment against him. The district court did not mention Boatright's Rule 60(b) motion and did not explicitly rule on it. As the district court entered a final judgment under Rule 54(b) following filings on the Rule 60(b) motion, the court's final judgment can be construed as an implicit denial of the motion. See Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098 (1981). But doing

so adds nothing. The summary judgment was interlocutory when Boatright filed his 60(b) motion. So he, in effect, simply asked for reconsideration of an interlocutory ruling. The district court declined to reconsider and entered a 54(b) certificate.

IV.

One matter remains. When the district court ruled, Boatright's knowing participation in a breach of trust made him jointly and severally liable with the fiduciary-in-breach. Since then, the Supreme Court has held that ERISA does not authorize suits for money damages against non-fiduciaries who knowingly participate in a breach of fiduciary duty. See Mertens v. Hewitt Associates, 113 S.Ct. 2063, 2066-72 (1993). Mertens may conflict with the district court's award of damages against Boatright. We remand for decision of whether Boatright is a fiduciary and, if he is not, whether the damage award is appropriate.

AFFIRMED IN PART and REMANDED IN PART.

Ex. 10 Feb. 3, 1993

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNN MARTIN, Secretary of
the United States Department of Labor,

Plaintiff,

vs .

CA 3-88-2470-X(consolidated with CA 3-88-2471-X)

THOMAS D. LUNDBERG, et al.

Defendants.

PENSION BENEFIT GUARANTY CORPORATION, on its own behalf and as statutory trustee of: THE RETIREMENT PLAN FOR SALARIED EMPLOYEES OF LUNDBERG INDUSTRIES, LTD., etc.

Plaintiff,

vs .

THOMAS D. LUNDBERG, et al.,

Defendants.

ORDER OF FINAL JUDGMENT AGAINST

DEFENDANT DAVID J. BOATRIGHT

WHEREAS, by Order dated October 29, 1991, this Court granted plaintiff Pension Benefit Guaranty Corporation's ("PBGC") motion to dismiss the counterclaim of defendant David J. Boatright ("Boatright"); and

WHEREAS, by order dated April 6, 1992, this Court granted the PBGC's motion for summary judgment against

Boatright on count VII of the PBGC's First Amended Complaint; and

WHEREAS, the PBGC has moved to dismiss all unresolved claims against defendant Boatright;

NOW THEREFORE the Court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay, and it is

ORDERED, pursuant to this Court's Order dated October 29, 1991, that Boatright's counterclaim against the PBGC is dismissed with prejudice; and it is

FURTHER ORDERED that count VIII of PBGC's First Amended Complaint is dismissed with prejudice; and it is

FURTHER ORDERED that counts III and IV of PBGC's First Amended Complaint, to the extent they relate to defendant Boatright, are dismissed with prejudice; and it is

FURTHER ORDERED, pursuant to this Court's Order dated April 6, 1992, that final judgment is entered against Boatright in the amount of three hundred thirty-three thousand two hundred ninety-six dollars and seventy-nine cents ($333,296.79), and that Boatright shall pay this amount to plaintiff PBGC; and it is

FURTHER ORDERED that interest on this amount shall accrue at the rate of 3.67% per annum, until this Judgment is paid in full; and it is

FURTHER ORDERED, pursuant to this Court's Order dated April 6, 1992, that Boatright's liability shall be joint and several with the liability of defendant John N. Sanders; and it

FURTHER ORDERED that this Judgment shall not affect in any way plaintiffs' rights against any defendant other than David J. Boatright.

Dated this 3rd day of February 19 93 .

Joe Kendall
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LYNN MARTIN, Secretary of the
United States Department of Labor,

Plaintiff,

VS.

Civil Action No CA3-882470-D
(Consolidated with)
CA3-88-2471-D

THOMAS LUNDBERG, et al.,
Defendants.

ORDER

Plaintiff Pension Benefit Guaranty Corporation ("PBGC") moves for summary judgment on count VII of its amended complaint against defendants John N. Sanders ("Sanders") and David J Boatright ("Boatright"). The court grants the motion.*

As pertinent to count VII, the summary judgment evidence establishes that Sanders as a trustee of three pension plans related to Lundberg Industries, Ltd. ("LIL'). Sanders Dep. at 20. He also served as counsel to LIL. Id. at 9. In November 1986, Sanders billed LIL for attorney's fees totaling $184,961.99 . P. Ex. D at 5083. This sum was disputed by LIL and unpaid. Thereafter, Sanders, as trustee, signed two checks payable to Boatright's firm, totaling $499,908,

paid ostensibly for actuarial services rendered for the plans. P. Ex. K, Boatright Dep. Exs. 15 and 17. Boatright then issued a check to Sanders for $199,925, representing purported "legal expenses," so that Sanders could get paid for his legal services. P. Ex. L and P. Ex. K, Boatright Dep. Ex 16 at 2.

It is clear from the undisputed summary judgment evidence that Sanders breached his fiduciary duties as plan trustee and acted for his own personal gain. Further, Boatright knowingly participated in this scheme, having been "prevailed Upon" by Sanders. P. Ex K, Boatright Dep. at 196. The PBGC entitled to judgment against Sanders and Boatright, jointly and severally, for $199,925.00 and for $133,371.79 in accrued interest as of November 15, 1991. See Osborne Decl. at ¶ 2.

PBGC's motion for summary judgment on court VII of its amended complaint is granted.

SO ORDERED.
April 6, 1992.

SIDNEY A. F ITZWATER
UNITED STATES DISTRICT JUDGE

*To date, neither defendant has responded to PBGC's motion. Although the court is sot permitted to enter a "default" summary judgment by virtue of defendants' failure to respond, it may accept plaintiff's evidence as undisputed, Tutton v. Garland Indep. Sch. Dist., 733 F.Supp. 1113, 1117 (N.D. Tex. 1990).

Ex. 12

Oct. 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
DALLAS DIVISION

LYNN MARTIN, Secretary of the
United States Department of Labor,

Plaintiff.

VS.

Civil Action No. CA3-88-2470- D
(CONSOLIDATED WITH: CA3-88-z471-D)

THOMAS LUNDBERG, et al.,

Defendants.

MEMORANDUM OPINION
AND ORDER

Plaintiff Pension Benefit Guaranty Corporation ("PBGC') moves to dismiss the counterclaims of defendant David J. Boatright ("Boatright") pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Finding that Boatright has failed to establish this court's jurisdiction, the court grants the motion.

I

In answering the April 3, 1991 amended complaint of PBGC, Boatright presents a six-count counterclaim that raises two types of claims. In counts 2, 3, 5, and part of count 1, Boatright complains of various acts of negligence on the part of PBGC in carrying out its duties as trustee. Counts 4, 6, and

the remainder of count 1 allege that individuals at PBGC publicized injurious falsehoods, both spoken and written, against Boatright. Boatright additionally requests the court to impose Fed. R. Civ. P. 11 sanctions against PBGC.

A

The court first addresses the negligence claims. Civil actions against PBGC are governed by 29 U.S.C. § 1303(f). Section 1303(f) is the exclusive means for bringing actions against PBGC in its capacity as trustee. 29 U.S.C. § 1303(f)(4). The statute permits any person who is a fiduciary, employer, contributing sponsor' member of a contributing sponsor's controlled group, participant, or beneficiary, and who is adversely affected by any action of PBGC with respect to a pension plan, to bring an action against PBGC. 29 U.S.C. § 1303(f)(1).

Boatright is the actuary for the pension plans at issue in this litigation. The only category for which he can conceivably qualify under § 1303(f)(1) is as a fiduciary. Yet Boatright alleges in his counterclaim that he was not a fiduciary of the plans. Counterclaim at ¶ 26(3). The court can discern no other grounds under the statute to support Boatright's negligence claims. Counts 2, 3, 5, and the part of count 1 alleging acts of

negligence on the part of PBGC while acting as trustee are dismissed pursuant to Rule 12(b)(6)

B

The court now considers Boatright's injurious falsehood claims. PBGC contends these claims are essentially defamation theories (libel and slander) and are barred because the Federal Tort Claims Act does not waive sovereign immunity. See 28 U.S.C. § 2680(h). Boatright contends he is not asserting libel or slander and that the claim of injurious falsehoods is a separate tort from defamation. Although Boatright is correct that injurious falsehood and defamation are distinct, the two torts are closely related. See Restatement (Second) of Torts § 623A cmt. g (1977). The primary difference between the two is that injurious falsehood protects economic interests whereas defamation protects personal reputation. Id. This distinction is, however, too technical to hold that injurious falsehood does not arise out of libel or slander so as to avoid the sovereign immunity bar. See Art Metal-U.S.A. Inc. v. United States, 753 F.2d 1151, 1156 (D.C. Cir. 1985). The distinction is even less important here where Boatright is obviously alleging reputational, as well as pecuniary, harms so that the alleged tort could easily be characterized as libel and slander. And if there is any doubt, the court is to construe sovereign

immunity principles in favor of the sovereign. See McMahon v. United States, 342 U.S. 25, 27 (1951).

The court, therefore, dismisses counts 4, 6, and the "injurious falsehood" part of count 1 as being barred by sovereign immunity.

C

The court having dismissed all six counts of Boatright's counterclaim, the separate request for Rule 11 sanctions is denied.

SO ORDERED.

October 29 , 1991.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

Ex. 13 Mar 24, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
U. S. COURT OF APPEALS

No. 93-1157

ROBERT B. REICH, Secretary of the United States Department of Labor,

Plaintiffs,

versus

PENSION BENEFIT GUARANTY CORPORATION, on its own behalf and as statutory trustee of : RETIREMENT PLAN FOR SALARIED EMPLOYEES OF LUNDBERG INDUSTRIES, LTD., etc.,

Plaintiff-Counter Defendant-Appellee,

versus

THOMAS D. LUNDBERG, ET AL., Defendants,

DAVID J. BOATRIGHT,

Defendant-Counter Plaintiff- Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
March 24, 1994

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

United States Circuit Judge

APPENDIX C
CONSTITUTIONAL PROVISIONS, STATUTES, RULES, REGULATIONS, AND REFERENCE

Ex. No.	Description	Citation	Page
14	Judicial Powers	U.S. Constitution, Article III, Section 2	62
15	Due Process	U.S. Constitution, Fifth Amendment	63
16	Equal Protection of Laws	U.S. Constitution, Fourteenth Amendment, Section 1	64
17	ERISA Annual Reports	ERISA Section 103(a)(1)-(2), 103(d), 103(e)	65
18	ERISA Full-Funding Limitation Under ERISA	ERISA Section 302(c)(6)-302(c)(7)	72
19	ERISA Compensation for Services	ERISA-Regulation 29 CFR § 2550.408c-2	74
20	ERISA/PBGC Determination Notices	ERISA-Regulation 29 CFR § 2606.22	77
21	ERISA Rules For Pension Plan Assets and Plan Termination	ERISA-Regulation 29 CFR § 2618	78
22	Signing of Pleadings, Motions, and other Papers; Sanctions	F.R.C.P., Rule 11	86
23	Dismissal of Actions	F.R.C.P., Rule 41(a)	88

Ex. No.	Description	Citation	Page
24	Summary Judgment	F.R.C.P., Rule 56	90
25	Textbook Reference on Full-Funding Limitation of ERISA	Jeffrey D. Mamorsky, ed., Employee Benefits Handbook, Warren, Gorham & Lamont, 1982, 1987 —§ 21.24	94

Ex. 14

Judicial Powers
United States Constitution
Article III, Section 2

1. The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States citizens or subjects.

2. In all case affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

Ex. 15

Due Process
United States Constitution
Fifth Amendment

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limbs; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Ex. 16

United States Constitution
Equal Protection of Laws
Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ERISA
Annual Reports
Section 103 (a)(1)-(2), 103(d), and 103 (e)

Act Sec. 103. (a)(1)

(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a), and shall be made available and furnished to participants in accordance with section 104(b).

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

Act Sec. 103. (a)(2)

If some or all of the information necessary to enable the administrator to comply with the requirements of this title is maintained by—

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 3(16) (B),

such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

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Act Sec. 103. (d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 301(b), or (C) a plan described both in section 4021(b) and in paragraphs (1), (2), (3), (4), (5), (6), or (7) of section 30l(a)) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date of the amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is tiled: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 302.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 302 and a statement explaining the basis of such valuation of present value of assets.

(6) Information required in regulations of the Pension Benefit Guaranty Corporation with respect to:

(A) the current value of the assets of the plan,

(B) the present value of all nonforfeitable benefits for participants and beneficiaries receiving payments under the plan,

(C) the present value of all nonforfeitable benefits for all other participants and beneficiaries,

(D) the present value of all accrued benefits which are not nonforfeitable (including a separate accounting of such benefits which are benefit commitments, as defined in section 400l(a)(16)), and

(E) the actuarial assumptions and techniques used in determining the values described in subparagraphs (A) through (D).

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) A statement by the actuary which discloses—

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future, but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

(11) If the current value of the assets of the plan is less than 60 percent of the current liability under the plan (within the meaning of section 302(d)(7)), such percentage.

(12) such other information regarding the plan as the Secretary may by regulation require.

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

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Act Sec. 103. (e) If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service or other similar organization covering the plan year and enumerating—

(1) the premium rate for subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization anti the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service or other organization, dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement, the remainder of such premiums, and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what pur-

pose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and a copy of the financial report of the company, service, or other organizational and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

Section 302(c)(6). If, as of the close of a plan year, a plan would (without regard to this paragraph) have an accumulated funding deficiency (determined without regard to the alternative minimum funding standard account permitted under subsection (g)) in excess of the full funding limitation—

(A) the funding standard account shall be credited with the amount of such excess, and

(B) all amounts described in paragraphs (2), (B), (C), and (D) and (3)(B) of subsection (b) which are required to be amortized shall be considered fully amortized for purposes of such paragraphs.

Section 302(c)(7). Full-Funding limitation—

(A) In General.—For purposes of paragraph (6), the term "full-funding limitation" means the excess (if any) of—

(i) the lesser of (I) 150 percent of current liability, or (II) the accrued liability (including normal cost) under the plan (determined under the entry age normal funding method if such accrued liability cannot be directly calculated under the funding method used for the plan), over

(ii) the lessor of—

(I) the fair market value of the plan's assets, or

(II) the value of such assets determined under paragraph (2).

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2550.408c-2 Compensation for services
(Published in 45 FR 51194)

(a) In general. Section 408(b) (2) Of the Employee Retirement Income Security Act of 1974 (the Act) refers to the payment of reasonable compensation by a plan to a party in interest for services rendered to the plan. Section 408(c)(2) of the Act and §§ 2550.408c-2(b)(1) through 2550.408c-2(b) (4) clarify what constitutes reasonable compensation for such services.

(b) (1) General rule. Generally. whether compensation is "reasonable" under sections 408(b)(2) and 408(c)(2) of the Act depends on the particular facts and circumstances of each case.

(2) Payments to certain fiduciaries. Under sections 408(b)(2) and 408(c)(2) of the Act, the term "reasonable compensation" does not include any compensation to a fiduciary who is already receiving full-time pay from an employer or association of employers (any of whose employees are participants in the plan) or from an employee organization (any of whose members are participants in the plan), except for the reimbursement of direct expenses properly and actually incurred and not otherwise reimbursed. The restrictions of this

paragraph (b) (2) do not apply to a party in interest who is not a fiduciary.

(3) Certain expenses not direct expenses. An expense is not a direct expense to the extent it would have been sustained had the service not been provided or if it represents an allocable portion of overhead costs.

(4) Expense advances. Under sections 408(b) (2) and 408(c) (2) of the Act, the term "reasonable compensation", as applied to a fiduciary or an employee of a plan, includes an advance to such a fiduciary or employee by the plan to cover direct expenses to be properly and actually incurred by such person in the performance of such person's duties with the plan if:

(i) The amount of such advance is reasonable with respect to the amount of the direct expense which is likely to be properly and actually incurred in the immediate future (such as during the next month); and

(ii) The fiduciary or employee accounts to the plan at the end of the period covered by the advance for the expenses properly and actually incurred.

(5) Excessive compensation. Under sections 408(b) (2) and 408(c) (2) of the Act, any compensation which would be

considered excessive under 26 CFR 1.162-7 (Income Tax Regulations relating to compensation for personal services which constitutes an ordinary and necessary trade or business expense) will not be "reasonable compensation." Depending upon the facts and circumstances of the particular situation compensation which is not excessive under 26 CFR 1.162-7 may, nevertheless not be "reasonable compensation' within the meaning of sections 468(b)(2) and 408(c)(3) of the Act.

§ 2606 22 Form and contents of initial determinations. All determinations to which this subpart applies shall be in writing, shall state the reason for the determination, and shall contain notice of the right to request review of the determination pursuant to Subpart C or Subpart D of this part as applicable, and a brief description of the procedures for requesting review.

ERISA

Ex. 21 Rules for Pension Plan Assets and Plan Termination
ERISA-Regulation 29 CFR § 2618
(Published in 46 FR 49842)

Subpart A—General

§ 2618.1 Purpose and scope.—(a) Purpose. Section 4044 of the Employee Retirement Income Security Act of 1974, as amended, contains rules for allocating a plan's assets when the plan terminates. These rules have been in effect since September 2, 1974, the date of enactment of the Act. Subpart A of this part sets forth general rules for applying Subparts B and C. Subpart B interprets the rules and describes procedures for allocating plan assets to priority categories 1 through 6. Subpart C interprets the rules and describes procedures for the allocation and distribution of any plan assets remaining after all benefits in priority categories I through 6 have been provided.

(b) Scope. This part applies to any nonmultiemployer plan covered by Title IV of the Act that submits a Notice of Intent to Terminate, or for which PBGC commences an action to terminate the plan under section 4042 of the Act, on or after the effective date of each subpart. [Amended by 46 FR 49842 on October 8, 1981, effective November 9, 1981.]

§ 2618.2 Definitions.—For purposes of this part:

"Act" means the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 *et seq.* (1976)), as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L No. 96-364, 94 Stat. 1208

"Annuity" means a series of periodic payments to a participant or a surviving beneficiary for a fixed or contingent period.

"Basic-type benefit" means a benefit that is guaranteed under the provisions of Part 2613 of this chapter, or would be if the guarantee limits in Part 2621 of this chapter did not apply.

"Code" means the Internal Revenue Code of 1954, as amended (26 U.S.C. § 1 et seq.. (1976)).

"Date of plan termination" means the date established under section 4048 of the Act.

"Expected retirement age" means the age determined in accordance with Subpart D of Part 2619 of this chapter when the participant has not elected, before the allocation date, an annuity starting date.

"Guaranteed benefit" means a benefit that is guaranteed under Part 2613 of this chapter.

"Irrevocable commitment" means an obligation by an insurer to pay benefits to a named plan participant or surviving

beneficiary, if the obligation cannot be canceled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary. An irrevocable commitment is considered to be made on its effective date.

"Mandatory employee contributions" means amounts contributed to the plan by a participant that are required as a condition of employment, as a condition of participation in the plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

"Nonbasic-type benefit" means any benefit provided by a plan other than a basic-type benefit.

"Nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of the Act (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of

any condition, or operation of the Act or the Code. Benefits that become nonforfeitable solely as a result of the termination of a plan will be considered forfeitable.

"Non-multiemployer plan" means a pension plan described in section 4021 (a) of the Act that is maintained by one trade or business (whether or not incorporated), or by more than one trade or business (whether or not incorporated), all of which are under common control within the meaning of Part 2612 of this chapter, or a plan maintained by more than one trade or business not under common control that is not a multiemployer plan as defined in section 4001(a)(3) of the Act.

"Notice of Sufficiency" means a notice issued by the PBGC that it has determined that plan assets are sufficient to discharge when due all obligations of the plan with respect to benefits in priority categories 1 through 4 after plan assets have been allocated to benefits in accordance with section 4044 of the Act and this part.

"PBGC" means the Pension Benefit Guaranty Corporation.

"Plan" means a defined benefit plan described in section 4021(a) of the Act.

"Plan administrator" means the plan administrator as defined in sections 4001(a)(1) and 3(16) of the Act. For this purpose, the term "employer", as used in section 3(16)(B), is defined in section 3(5) of the Act.

"Pool of eligible participants and beneficiaries" means—

(a) For a contributory plain that provides for reversion of residual assets to the employer, those individuals entitled to benefits in priority category 2, determined as of the date plan assets are to be distributed; and

(b) For any plan that does not provide for reversion of residual assets to the employer, those individuals entitled to benefits in priority categories 2 through 6, determined as of the date plan assets are to be distributed. [Added by 46 FR 49842 on October 8, 1981, effective November 9, 1981.]

"Priority categories" or "priority category" means the categories contained in sections 4044(a) (1) through (6) of the Act that establish the order in which plan assets are to be allocated.

"Residual assets" means the plan assets remaining after all liabilities of the plan to participants and their beneficiaries for benefits through priority category 6 have been satisfied. [Added by 46 FR 49842 on October 8, 1981, effective November 9, 1981.]

"Voluntary employee contributions" means amounts contributed by an employee to a plan, pursuant to the provisions of the plan, that are not mandatory employee contributions.

§ 2618.3 General rule.—(a) Asset allocation. Upon the termination of a nonmultiemployer plan, the plan administrator shall allocate the plan assets available to pay for benefits under the plan in the manner prescribed by this part. Plan assets available to pay for benefits include all plan assets (valued according to Part 2620 of this chapter) remaining after the subtraction of all liabilities, other liabilities for future benefit payment, paid or payable from plan assets under the provisions of the plan. Liabilities include expenses, fees and other administrative costs, and benefit payments due before the allocation date. Except as provided in § 2618.4(b), an irrevocable commitment by an insurer to pay a benefit, which commitment is in effect on the date of the asset allocation, is not considered a plan asset, and a benefit payable under such a commitment is excluded from the allocation process.

(b) Allocation date. For plans that close out pursuant to a Notice of Sufficiency under the provisions of Subpart C of Part 2615 of this chapter, assets shall be allocated as of the

date plan assets are to be distributed. For other plans, assets shall be allocated as of the date of plan termination.

§ 2618.4 Violations.—(a) General. A plan administrator violates the Act if plan assets are allocated distributed upon termination in a manner other than that described in section 4044 of the Act and this part, except as may be required to prevent disqualification of the plan under the Code and regulations thereunder.

(b) Distributions in anticipation of termination. A distribution, transfer, or allocation of assets to a participant or to an insurance company for the benefit of a participant made in anticipation of plan termination, is considered to be an allocation plan assets upon termination, and is covered by paragraph (a) of this section. In determining whether a distribution, transfer, or allocation of assets has been made in anticipation of plan termination PBGC will consider all of the facts and circumstances including—

(1) Any change in funding or operation procedures;

(2) Past practice with regard to employee requests for forms of distribution;

(3) Whether the distribution is consistent with plan provisions; and

(4) Whether an annuity contract that provides for a cutback based on the guarantee limits in Part 2621 of this chapter could have been purchased from an insurance company.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be

stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion. or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative. shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defen-

dant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a mat-

ter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Cases Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or

solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be guilty of contempt.

Ex. 25 Jeffrey D. Mamorsky, ed., Employee Benefits Handbook, Warren Gorham & Lamont, 1982, 1987

§ 21.24 Full Funding Limitation

The minimum contribution required with respect to any plan year will not be more than the amount required to fully fund the benefits accrued under the plan. If the normal operation of the funding standard account requires a larger contribution, appropriate adjustments to the funding standard account must be made to limit the minimum contribution to the full funding amount. The Tax Reform Act of 1986 (the 1986 Act) restricts the amount of compensation that can be taken into account for funding purposes to $200,000.